IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 14404 of 2004
with
SPECIAL CIVIL APPLICATION No 351 of 2005

For Approval and Signature:

HON'BLE MR.JUSTICE JAYANT PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

GIRISHKUMAR NANJIBHAI NATHWANI PROPRIETOR-J.K.PETROLEUM
Versus
COLLECTOR JUNAGADH

Appearance:
1. Special Civil Application No. 14404 of 2004
MR NAVIN PAHWA for M/S THAKKAR ASSOC. for Petitioner No. 1
MR KP RAVAL & MR PRADIP BHATE A.G.Ps. for Respondent No. 1-2
2. Special Civil Application No. 351 of 2005
MR HR PRAJAPATI for Petitioner No. 1
MR KP RAVAL & MR PRADIP BHATE A.G.Ps. for Respondent No. 1-2

CORAM : HON'BLE MR.JUSTICE JAYANT PATEL

Date of decision: 09/02/2005

ORAL JUDGEMENT

1. Rule is already issued in Special Civil Application No. 14404 of 2004 and, therefore, in Special Civil Application No. 351 of 2005, Rule. Mr. Pradip Bhate learned A.G.P. appears and waives service of rule on behalf of the respondents. With the consent of the learned advocates appearing for both the sides, both the matters are finally heard today.

2. The petitioners of both these petitions have applied for license under the Solvent, Raffinate & Slop (Acquisition, Sale, Storage, & Prevention of Use in Automobiles), Order 2000 (hereinafter referred to as the "Solvent Control Order") and their license applications have been rejected on the ground that they were detained under P.B.M. Act and as per the Guidelines of the State Government, no license can be issued to the petitioners and, therefore, under these circumstances, the petitioners have approached this Court. It may also be recorded that the petitioners have also moved an application to the State Government, but the same has not been entertained since the appeal/revision is not competent. It is the contention of both the petitioners that the detention orders on the basis of which they are denied license, are quashed by the competent Court. So far as the petitioner of Special Civil Application No. 14404 of 2004 is concerned, the detention order was quashed in the year 1992 and so far as the petitioner of Special Civil Application No. 351 of 2005 is concerned, the detention order was quashed in the year 1996. On the aspect of the quashing of the detention orders by the competent Court is concerned, there is no dispute even by the State Government. However, the contention which is sought to be raised and which shall be dealt with hereinafter, is that the detention orders were quashed on technical grounds and, therefore, it can well be said that the persons were detained under P.B.M. Act, 1980, and, therefore, the same can still be made a basis for the purpose of considering the aspect of grant of license as per the Guidelines issued by the State Government.

3. I have heard learned counsel Mr. Pahwa appearing for the petitioner in Special Civil Application No. 14404 of 2004 as well as Mr. Raval and Mr. Pradip Bhate learned A.G.Ps. appearing for the respondents.

3.1. It appears that on factual aspects of the

applications made by the petitioners and rejection by the District Magistrate on the ground of detention of the petitioners concerned under P.B.M. Act, are not in dispute. As said earlier, there is also no dispute on the point that the detention orders of both the petitioners were quashed by the competent Court in the year 1992 and in the year 1996 respectively. The learned A.G.Ps. appearing in both the matters have mainly supported the orders passed by the District Magistrate rejecting the applications for the grant of the license, on the basis of the Guidelines issued by the State Government vide its Resolutions dated 10th June, 2003 and 12th November, 2003.

3.2. Perusal of the aforesaid Guidelines, copies whereof, have been produced along with the affidavit-in-reply filed by Mr. G.K. Rathod, Under Secretary, Food, Civil Supplies & Consumer Affairs Department in Special Civil Application No. 14404 of 2004, shows that as per Clause (1) of the Guidelines dated 10th June, 2003, if any proceedings are undertaken under P.B.M. Act then in that case, such person shall not be entitled to new license for solvent. Clause (2), (3) & (4) are substituted by subsequent Guidelines dated 12th November, 2003 issued by the State Government, which is also produced with the said affidavit. Perusal of the same shows that as per Clause (2), if any proceedings are initiated for serious penal action under the Essential Commodities Act, or under any Control Order issued by the State Government, then also such applicant shall not be entitled to new license for solvent. Clause (3) provides that if any proceedings are initiated under P.B.M. Act, 1980 or any penalty is imposed for irregularity, then such person or the family members of such person who are either Partners or Directors, shall not be granted license for solvent. The other portion of the said Clause provides for the procurement the details in this regard which is not relevant in the present case. The other Clauses of the Guidelines dated 10th June, 2003 namely Clauses (4), (5), (6), (7), (8), (9), (10), (11), (12) & (13) streamline the procedure to be adopted by the District Magistrate for the examination of the application for the grant of license and other requirements which are also not relevant for the purpose of these petitions and, therefore, it is not necessary to deal with the same or to reproduce in this order. It appears that for the purpose of deciding these petitions, as such, Clause (1) of the Guidelines dated 10th June, 2003 and Clauses (2) & (3) which is substituted by Guidelines dated 12th November, 2003, are only required to be considered for examining the legality and validity

of the orders passed by the District Magistrate, rejecting the license applications of the concerned petitioners.

4. In the affidavit-in-reply filed on behalf of the State Government, the contentions sought to be canvassed are at paragraph nos. 3 & 4, which read as under :-

"3. It is submitted that observation made by the Hon'ble Court that it prima facie appears that if the order passed by the detaining authority under P.B.M. Act is quashed by the Competent Court, the same cannot be said to be a ground for depriving the person to get license.

It is submitted that if detention order under P.B.M. Act is quashed by the competent Court, it should not be a ground for depriving the person to get license but it is observed that in many cases detention orders are quashed by the competent court on technical ground. It is submitted that persons who are prosecuted under P.B.M. Act are found habitually engaged in illegal activities like adulteration etc.

It is submitted that therefore, so as to prevent such kind of malpractices, adulteration etc., the Govt. of Gujarat has instructed all District Magistrate not to issue license to such person who do not hold past food record and prosecuted under P.B.M. Act, 1980 as a precautionary measure.

It is submitted that the aforementioned Govt. Resolutions are to facilitate the Order, 2000. It is submitted that this Govt. Resolutions are not contrary to any of the provisions of the law and Order 2000. It is submitted that the product of Light Diesel Oil is covered under the definition of solvent under the schedule of Amendment Order, 2001.

It is submitted that in Special Criminal Application no. 959 of 1992 preferred by the petitioner challenging

the order of detention was quashed and set aside by the Hon'ble Court vide order dated 04/09/1992 and the Hon'ble Court while setting aside the order of detention has observed as under :-

"Therefore, the right of petitioner under Article 22 (5) of the Constitution to make effective representation is violated in this case."

It is submitted that thus it was found proper by the authority vide order dated 06/09/2004 rejecting his application.

4. It is submitted that this Hon'ble Court vide order dated 17/01/2005 observed that further, it is not made clear as to who shall be included in the definition of family, whether the person himself, or his dependent members, or any blood relations.

It is submitted that as a general definition of family includes the person, his wife, children and father-mother and dependents. It is submitted that there is no specific provision provided under the instructions.

It is submitted that instruction or Guidelines are issued to consider it by the authority before granting the license under Order 2000. It is submitted that to examine whether any family member is indulged or likely to be indulged into such malpractices of adulteration it is submitted that person/applicant whose relative is found to have been not involved in such malpractices or adulteration under Prevention of Black-marketing then there is no question of denying the license. It is submitted that similarly while examining it shall have to consider whether applicant/license holder may not indulge into the activity directly or indirectly. It is submitted that it is

further to examine that person either himself or his family members' detention under P.B.M. is not directly or indirectly connected with such activity prohibiting the P.B.M.

It is submitted that thus in view of the above clarification, the petitioner is not entitled to get his license renewed.

4.1. If the matters are examined in light of the aforesaid Clauses of the Guidelines issued by the State Government for the purpose of grant of license under the Solvent Control Order, it appears that Clause (1) of the Guidelines denying license to the person on the ground of detention under the P.B.M. Act, is mainly on two grounds; one is that such person is in the habit of indulging into such activities which result into detention under P.B.M. Act and second, even if the order is quashed by the competent Court, normally, it would be on technical grounds and, therefore, as per the Guidelines, new license is not to be granted to such person. As such, right to apply for license is a right which may be read under Article 19 (1) (g) of the Constitution of India. If the matter is strictly examined, even for the purpose of putting restrictions upon such fundamental right of any citizen, there should be valid legislation for such purpose and the Guidelines issued by the State Government cannot be said to be a valid legislation or rather not a legislation putting restrictions upon the power of the licensing authority to grant license. Apart from the above, even if it is considered that there are powers with the State Government to issue Guidelines, which may be having, if not mandatory, but guiding effect, to the licensing authority for exercising power, then also such Guidelines must meet with the test of reasonable restriction upon the right of any person to apply and to be considered for license under the Solvent Control Order. When the competent Court has quashed the orders of detention by no stretch of imagination such restriction can be said to be reasonable restriction in the eye of law, on the basis of that, detention orders were passed under P.B.M. Act, but were quashed on technical grounds. As such, once the detention order is quashed by the competent Court, then such detention order does not remain at all in the eye of law, unless it is expressly saved by or recognized by any statutory provisions for the purpose of taking proceedings. Further, even if it is considered that the detention order has continued to remain on record at the

time when the matter was considered by the District Magistrate for the purpose of grant of license under the Solvent Control Order, then also, putting restriction upon the right of any citizen who was earlier detained under P.B.M. for the whole of the life or for the remainder period, without specifying a particular limit of the period, would be absurd on the face of it. Normally no policy of the State Government can conceive a situation, that all throughout the life of the person concerned, he will not get any opportunity to improve or for all time to come, he will be debarred even for applying for license, though other eligibility criteria are satisfied. Such policy, debarring a person from getting license under the Solvent Control Order, can meet with the test of reasonableness, in any case, if for a reasonable period, say after 7 years or so, a person is treated as eligible for applying for license or upto the period of 7 years, he is treated as non-eligible to apply for license. Therefore, Clause (1) of the Guidelines puts restriction upon the right of the person to apply for license for the remainder period of the life and such restriction, in my view, is not only arbitrary and unreasonable, but is absurd on the face of it, in absence of any specified period provided for such prohibition.

4.2. Clause (2) of the Guidelines providing for initiation of proceedings for serious penalty under the Essential Commodities Act or under other Control Orders issued by the State Government, also do not provide for the period of debarring such person to get license nor does it provide for ultimate outcome of the proceedings which are initiated either under the Essential Commodities Act or under other Control Orders issued by the State Government. Had it been provided that until such proceedings are terminated a person would not be eligible to apply for license or that if any penalty or conviction has resulted into such proceedings, then such person/s would not be eligible to apply for license, might stand on a reasonable aspect. But, even in latter case, i.e. in the cases where proceedings have resulted into conviction or imposition of penalty, if a person is to be kept away from the eligibility criteria for a period of whole life or for the remainder of the period of life, then in that case, such Guidelines cannot meet with the test of reasonableness and it would be an absurd restriction imposed by the State upon the fundamental right of any citizen under Article 19 (1) (g) of the Constitution of India. Such Guidelines can meet with the test of reasonableness, if, for a reasonable period like seven years or so, such person is kept away from eligibility criteria for applying license.

4.3. So far as Clause (3) is concerned, it also provides for keeping the person away from the eligibility criteria, if the family member of such person is either Partner or Director, or his holding any important position. The contention which is sought to be canvassed in the affidavit-in-reply, reproduced hereinabove, shows that the definition of "Family" includes the person, his wife, children and father-mother and dependents, which has not been expressly provided in Clause (3). Regarding the definition of "Family", the same is explained in the affidavit-in-reply filed on behalf of the State Government. If the definition of "Family" is restricted to dependent members of the family or husband and wife, then it may stand on a different footing. But if it is stretched to the extent of debarring the persons from the eligibility criteria, even if such person is not included in the definition of the husband, wife and other dependent members of the family, namely in the present case, father-mother, if they are not dependent, then in that case, such Guidelines issued by the State Government cannot be said to be reasonable, but would be rendered to be not only unreasonable, but it would be arbitrary on the face of it. If a person is dependent member of the family or if such non-dependent member of family is projected as dummy applicant, then it may stand on a different footing, because the benefit which may be derived by getting license may go to every person against whom the proceedings were initiated under P.B.M. Act or under other Control Orders. But, if at the time when the application for license is preferred and such person is not a dependent member of the family of the person against whom the proceedings were initiated, then in that case, it would be absurd to keep such member of the family away from the eligibility criteria to apply for license. Apart from the source of income and the benefit to be enjoyed by the only dependent member of the family, it is not necessary, that in every case all members of the family who are not dependent would develop the same habit or would behave in the same fashion and in the same manner in which other independent members of the family are behaving when the proceedings under the P.B.M. Act or under other Control Orders were initiated. It would be absurd to presume that other members of the family who are not dependent upon the one who has been detained under P.B.M. or against whom proceedings under any of the Control Orders have been initiated, will indulge into some activity which may attract the breach of the relevant provisions of the Act or any of the Control Orders. As observed earlier, it would be absurd to conceive a situation that merely because one of the

members of a family was involved in a serious offence or crime or irregularity, the other independent members of the family would also have the same mentality or should share the responsibility in the same manner, for the purpose of keeping himself away from the eligibility criteria for applying license. In my view, keeping the other independent members of the family away from the eligibility criteria for applying for license under the Solvent Control Order, is not only ex-facie arbitrary but also absurd and, therefore, the Guidelines issued by the State Government to that extent is required to be rendered as violative of Article 14 of the Constitution.

5. Hence, Clause (1), (2) & (3) issued by the State Government as per Resolution dated 10th June, 2003 with Resolution dated 12th November, 2003, so far as it relates to treating the persons non-eligible to apply for license, if he is detained under the P.B.M. Act, even if the detention order has been quashed by the competent Court, is arbitrary, unreasonable and violative of Article 14 of the Constitution. It further appears that on the basis of such Guidelines, the concerned District Magistrate has rejected the applications of the petitioners concerned, for license under the Solvent Control Order. It is required to be recorded that the Guidelines issued by the State Government in any case can be said as having guiding effect for the purpose of exercise of power, but such Guidelines cannot be read as putting total restriction upon the exercise of power by statutory authority and on the said aspect, the law is settled and, therefore, no further discussion is required.

6. In view of the aforesaid discussion, the impugned orders passed by the District Magistrate, rejecting the license applications of the concerned petitioners are quashed and set aside. The District Magistrate is directed to consider the applications of the concerned petitioners, without being influenced by the fact that the concerned petitioners were detained under the P.B.M. Act and the decision shall be rendered as early as possible, preferably within a period of one month from the date of receipt of the writ of this order. Before parting with, it is required to be observed that the Secretary, Food, Civil Supplies Department, respondent no. 1 herein is directed to place the matter before the Chief Secretary of the State Government for framing the fresh Guidelines if required, in light of the observations made by this Court for Clause (1) (2) & (3) of the aforesaid Resolutions and the report of the same shall be submitted to this Court within a period of six

months from the receipt of the order of this Court.

7. Both the petitions are partly allowed. Rule is made absolute to the aforesaid extent with no order as to costs.

[JAYANT PATEL, J.]

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